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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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**No. 971**

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JOSEPH AGO STASSI,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.

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*Counsel for Petitioner.*

JACOB J. AMATO,

*Of Counsel.*



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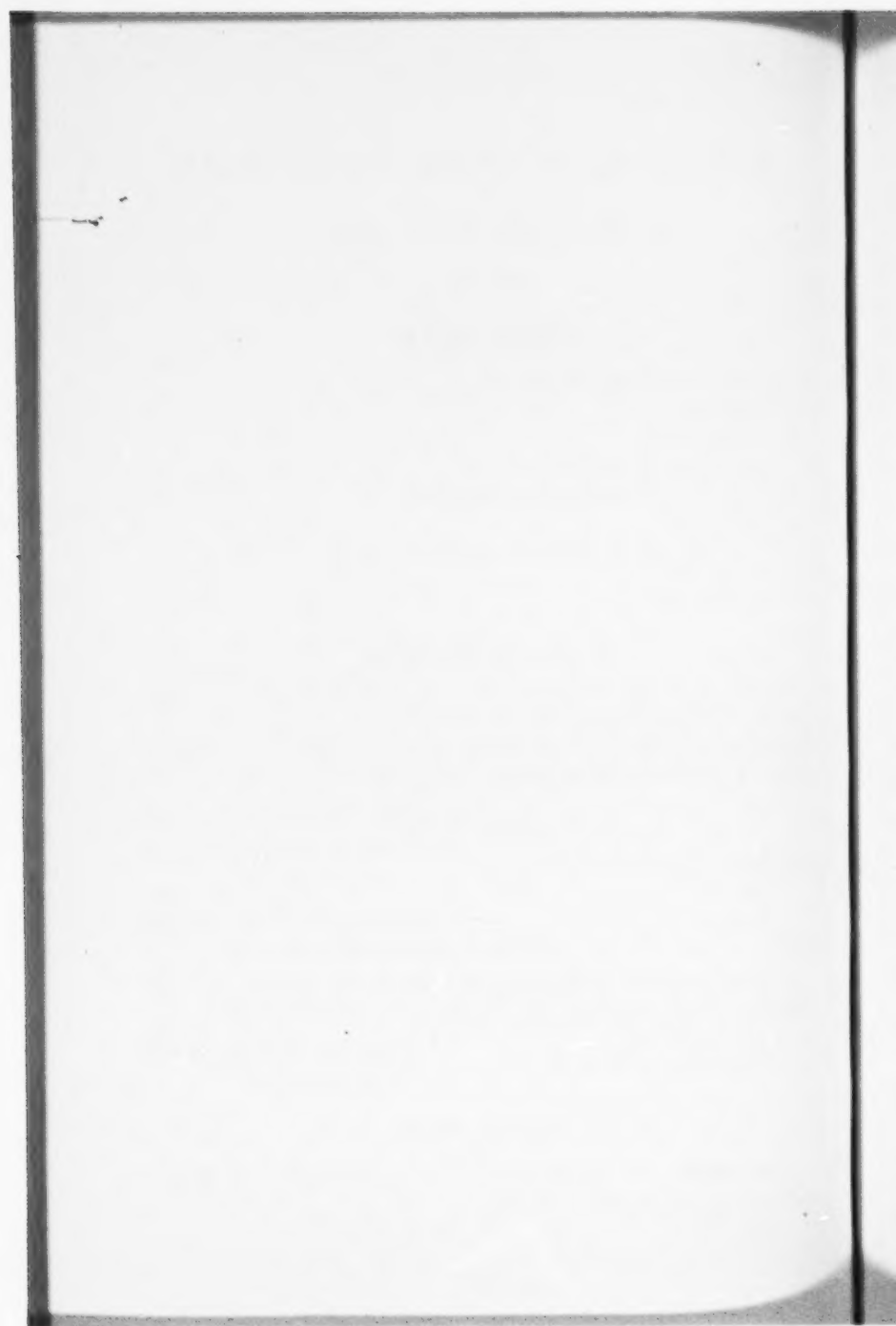
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*To the Honorable the Chief Justice of the United States and  
Associate Justices of the Supreme Court of the United  
States:*

The petitioner, Joseph Ago Stassi, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered December 28, 1945 (R. 43), affirming a judgment of conviction for violating Regulation 626.1 made pursuant to Selective Training and Service Act of 1940, as amended.

**Opinion Below**

The opinion of the Circuit Court of Appeals (R. 40-43) is reported in 152 F. (2d) 581.

### **Jurisdiction**

The judgment of the Circuit Court of Appeals was entered December 28, 1945 (R. 43) and petition for a rehearing (R. 40-72) was denied February 18, 1946 (R. 72). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925. See also Rule 11 of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

### **Questions Presented**

1. Whether an appellate court may sustain a judgment of conviction on a theory different than that on which the case was prosecuted in the court below.
2. Whether Regulation 626.1(b) made pursuant to Selective Training and Service Act of 1940, as amended, is so vague, indefinite and uncertain as to provide no ascertainable standard of guilt and to violate the due process clause.

### **Statute and Regulation Involved**

The pertinent provisions of Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. Appendix, Section 311) are as follows:

#### **Offenses and Punishment.**

"Any person \* \* \* who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, \* \* \* shall upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, \* \* \*."

Section 626.1(b) of the Regulations, at the time in question, read as follows:

“Each classified registrant shall, within 10 days after it occurs, and any other person should, within 10 days after knowledge thereof, report to the local board in writing any fact that might result in such registrant being placed in a different classification.”

### **Statement**

Petitioner was convicted in the United States District Court for the Eastern District of Louisiana on an indictment (R. 3-5) consisting of one count and charging a violation of Section 11 of the Selective Training and Service Act (50 U. S. C. Appendix, Section 311) in that he failed to perform a duty required of him under Regulation 626.1(b), made pursuant to said Act and sentenced to serve thirty (30) months and to pay a fine of Five Hundred (\$500.00) Dollars.

Petitioner appealed from the judgment of conviction to the Circuit Court of Appeals for the Fifth Circuit, prosecuting said appeal upon the clerk's record of proceedings pursuant to Rule 8 of the Criminal Appeals Rules promulgated by this Court May 7, 1934. The sole question raised on said appeal was whether Regulation 626.1(b) is so vague, indefinite and uncertain as to fix no ascertainable standard of guilt and to violate the due process clause.

The Circuit Court of Appeals, in its opinion affirming the judgment of conviction, expressed the opinion by way of dictum “that the regulation under attack affords an ascertainable standard of guilt and is constitutional,” but held that under its view of the case it was “not necessary to decide the constitutional question, since apart from the regulation the indictment is sufficient to charge an offense under Code Section 311.” The Court further held that

“when we strip away Selective Service Regulation 626.1(b) and leave only the quoted excerpt of Section 11, just adverted to, we find that the indictment clearly and plainly charges a violation of this statute and is in no wise vague, indefinite or uncertain.”

Petitioner thereupon moved that a transcript of the charge delivered to the jury by the trial court (R. 58-72) be filed and made a part of the record on appeal herein, which motion was granted (R. 58).

This transcript (R. 61-62) shows that the court in charging the jury as to the law of the case stated:

“The indictment, which is a mere accusation and not evidence against the accused charges that the defendant, a registrant of Selective Service Local Board No. 2 in and for the Parish of Tangipahoa, State of Louisiana, did unlawfully, knowingly, wilfully and feloniously fail and neglect to perform a duty required of him under the provisions of the Selective Training and Service Act of 1940 as amended, and the rules, regulations and directions made and issued pursuant thereto, by failing and neglecting to report to his Local Board, in writing or otherwise, certain facts which might have resulted in the defendant Stassi being placed in a different classification than that in which he was placed during the period from July 1, 1943 to May 21, 1944, the said facts being that he, the said Stassi, though having obtained employment at Delta Shipbuilding Company, Inc., was not during the period aforesaid, a full time, regularly employed workman averaging forty-eight hours per week at Delta Shipbuilding Company, that he was chronically absent from said employment, having worked only the number of days specified in each of the months in question; and that during the period aforesaid, he was principally engaged in the operation of his barroom at Hammond. You will, of course, examine the indictment for a more complete statement of the charge.



"Now the particular statute with reference to this charge is Section 11 of the Selective Training and Service Act, which to the extent here pertinent provides that 'Any person who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act shall upon conviction be punished in the manner therein provided.'"

"The applicable Regulations, which are binding on the defendant only to the extent that he may know about them, is number 626. This regulation to the extent here pertinent provides that 'Each classified registrant shall, within ten days after it occurs, report to the local board in writing any fact that might result in such registrant being placed in a different classification.'"

The transcript (R. 66) further shows that after the jury had retired they returned to court and submitted the following question:

"We would like to know how many hours per week, per month or per year are required by law of a defense plant worker to be classified other than 1-A, or to be deferred?"

and that the court thereupon gave the following instruction:

"Now the Court is not in a position, gentlemen, to answer the first question. There is no evidence in the record on that subject and so far as the Court knows, there is no regulation covering it. Counsel tell me that is their understanding of the situation too. The only thing I can do in response to that question is to read you again the language of the applicable regulation, which I shall now do.

"The applicable regulation which is binding on the defendant, only to the extent that he may know about it, is No. 626.1. This regulation to the extent here pertinent, provides that each classified registrant shall within ten days after it occurs report to the Local Board in writing any fact that might result in such registrant being placed in a different classification."

The transcript (R. 68-69) further shows that the jury returned to the court a second time and that the following took place:

"The Court:

"Gentlemen, I received your message that you were unable to agree on a verdict and under the circumstances, because of the fact that you have been deliberating on this case for more than four hours, I have determined to give you further instructions in an effort to assist you in the solution of your difficulties.

\* \* \* \* \*

"You may now retire for further consideration of your verdict.

"Juror:

"May I ask a question? Could you explain the point to what extent the reasonable doubt should be considered necessary to comply with the registration law as to a person obtaining a deferment, working in a war essential industry, what would you consider a reasonable time he should put in that plant, and if he does not put in a reasonable time, isn't he violating his own agreement he made with the Selective Service Board?

"The Court:

"The question is complicated——

"The Juror:

"I am not indicating which way I stand, I am just asking for enlightenment on that point.

"The Court:

"That is really not an issue in this case at all, whether anyone lives up to his moral obligations or otherwise. The issue in this case is whether or not the defendant failed and neglected to perform the duties that were required of him under the Act, whether he knowingly failed to do the things that were required of him under the Act.

"Now the Draft Board is a fact finding tribunal. They make the classifications. The classification is

not permanent; it is no function of this jury to determine whether the defendant is properly or improperly classified at any time. The law imposes the duty under the regulations to report any fact within ten days after its occurrence which might affect his classification."

Petitioner thereupon moved the Circuit Court of Appeals for a rehearing on the ground that the charge submitted by the trial court to the jury furnished proof absolute that petitioner was convicted of violating Section 11 of the Selective Training and Service Act in that he failed to perform a duty required of him under Regulation 626.1(b) (R. 45-72). Petitioner's motion for rehearing was denied without opinion (R. 72).

#### **Reasons Relied upon for Granting Writ**

The ruling of the Circuit Court of Appeals that under its view of the case it is not necessary to decide the constitutionality of Regulation 626.1 (b), as petitioner's conviction was based solely upon a violation of Section 11 of the Selective Training and Service Act of 1940, is simply an attempt to sustain the judgment of conviction herein on a theory other than that on which the case was prosecuted in the court below. The indictment and the judge's charge furnish positive and indisputable proof that petitioner was convicted of violating Section 11 of the Selective Training and Service Act, in that he wilfully failed to perform a duty required of him under Regulation 626.1 (b). There is something basically wrong and unjust about a ruling that sanctions the conviction of a man without according him the opportunity to test the constitutionality of the administrative regulation under which he stands convicted. This ruling is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The constitutionality of Regulation 626.1(b) has never been passed upon by this or any other court. Regulation 626.1 (b) requires that every registrant report "any fact that might result" in a change of his classification. The terms it employs are so vague, indefinite, and uncertain that on its face it is repugnant to the due process clause. They fix no ascertainable standard of guilt, in that they command no specific or definite act. The regulation simply commands that a registrant report "any fact", which some prosecutor "might" think up as falling within its questionable scope and which a jury "might" consider "might result" in a change of his classification. The criminality of the regulation thus depends solely upon the viewpoint of the particular jury before whom a charge based thereon is tried, and not upon any definite standard fixed by the text of the regulation.

The fact that an experienced trial judge on two separate occasions, when the jury had returned to the court room and sought instructions on the standard to be applied by them in determining whether petitioner had violated Regulation 626.1(b), was unable to "clear away with concrete accuracy" their difficulties, but simply reread to them Regulation 626.1(b), thus leaving them free to speculate and fix any standard on which they "might" agree, indicates more clearly than any words of counsel the vagueness, indefiniteness and uncertainty of the regulation in question. Petitioner should not be forced to serve two and one-half years for the alleged violation of such a regulation, without first being afforded an opportunity to test its constitutionality.

## Argument

### I

Section 11 of the Selective Training and Service Act of 1940 makes criminal a wilful failure to perform any duty required of a registrant by the Act, or the rules or regulations made under it. Regulation 626.1 (b) imposes a duty upon each classified registrant to report to his local board in writing "any fact that might result" in a change of his classification.

The indictment in its charging part (R. 4) parallels Regulation 626.1(b) and definitely charges a wilful failure to perform a duty required of petitioner under said regulation, that is, failing and neglecting to report to his local board in writing certain facts which might have resulted in a change of his classification. Moreover the indictment in its conclusion (R. 5) alleges that the offense therein charged is contrary to the Selective Training and Service Act and "especially Regulation Number 626.1."

In addition, the trial court on three separate occasions instructed the jury that petitioner was charged with failing to perform a duty required of him under Regulation 626.1(b) (R. 62; 66-67; 69-70), and on two occasions read to them the pertinent provisions of said regulation (R. 62; 66-67). In fact, the Court's last instruction to the jury was "the law imposes the duty under the regulations to report any fact within ten days after its occurrence which might affect his classification" (R. 69).

That the case was tried and submitted to the jury upon the theory that petitioner failed to perform a duty required of him under Regulation 626.1 (b) cannot be questioned. It is axiomatic that a thing cannot "be" and "not be" at the same time. The charge against petitioner can not "be based" upon Regulation 626.1 (b) for the purpose of

securing his conviction, and "not based" on Regulation 626.1 (b) for the purpose of sustaining such conviction.

The ruling of the Circuit Court of Appeals sustaining the judgment of conviction on a different theory is purely arbitrary and clearly erroneous.

## II

It is settled law that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. State of New Jersey*, 306 U. S. 451, 453. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Company*, 269 U. S. 385, 391.

Regulation 626.1 (b) requires that each classified registrant report to his local board in writing "any fact that might result" in a change of his classification. The regulation fixes no ascertainable standard of guilt, in that it commands no specific or definite act. *Connally v. General Construction Company, supra*, 269 U. S. 385, 392. The terms it employs to indicate what it purports to denounce are so vague, indefinite, and uncertain that it must be condemned as repugnant to the due process clause. *Lanzetta v. State of New Jersey, supra*, 306 U. S. 451.

The regulation does not require the registrant to report any fact which would change his classification, but "any fact that might result" in such a change. "Might" denotes "possibility", not "certainty". It thus commands a registrant, at the peril of going to jail if he guesses wrong, to report "any fact" which a jury "might" consider "might result" in a change of classification. The criminality of the

regulation is thus made to depend solely upon the viewpoint of the particular court and jury before whom a registrant is tried, and not upon any definite standard fixed by the words of the regulation.

Regulation 626.1 (b), in commanding that a registrant report "any fact" which a jury may consider "might result" in a change of classification, falls within the condemnation, which this Court held the sections of the Espionage Act avoided, *Gorin v. United States*, 312 U. S. 19, 26, and as to which it had the following to say:

"The sections are not simple prohibitions against obtaining or delivering to foreign powers any information which a jury may consider relating to national defense. If this were the language it would need to be tested by the inquiry as to whether it had double meaning, *United States vs. Reese*, 92 U. S. 214, or forced anyone, at his peril, to speculate as to whether certain actions violated the statute, *Lanzetta vs. New Jersey*, 306 U. S. 451. This court has frequently held criminal laws deemed to violate these tests invalid. *United States vs. Cohen Grocery Company*, 255 U. S. 81, 89, urged as a precedent by petitioners, points out that the statute there under consideration forbade no specific act, that it really punished acts 'detrimental to the public interest when unjust and unreasonable' in a jury's view. In *Lanzetta vs. New Jersey* the statute was equally vague. 'Any person not engaged in any lawful occupation, known to be a member of any gang \* \* \*, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other state, is declared to be a gangster \* \* \*. We there said that the statute 'condemns no act or omission'; that the vagueness is such as to violate due process."

That Regulation 626.1(b) is so vague, indefinite, and uncertain as to fix no ascertainable standard of guilt was demonstrated in a practical way during the trial of the

present case. The jury, after they had retired, returned to the court to seek further instructions and submitted two written questions, the first of which was as follows:

"We would like to know how many hours per week, per month, or per year are required by law of a defense plant worker to be classified other than 1-A, or to be deferred."

in answer to which the Court stated:

"Now, the Court is not in a position, gentlemen, to answer the first question. There is no evidence in the record on that subject and so far as the Court knows, there is no regulation covering it. Counsel tell me that it is their understanding of the situation too. The only thing I can now do in response to that question is to read you again the language of the regulation, which I shall now do."

The Court, thereupon, reread to the jury the pertinent parts of Regulation 626.1.

The jury's question clearly indicates that the jurors were confused as to the standard to be applied by them in determining whether petitioner had failed to perform a duty required of him under Regulation 626.1 (b). The rereading of the regulation certainly did nothing to assist them. The fact that an experienced trial judge was unable to clear away their difficulties "with concrete accuracy" points strongly, if not positively, to the fact that it was impossible for the Court to do so, as the regulation is so vague, indefinite and uncertain as to fix no ascertainable standard of guilt.

The fact that the prosecutor has specified a particular act as coming within the terms of the regulation in no way validates it. If the regulation on its face is repugnant to the due process clause, specification of details of the offense



charged in the indictment cannot serve to validate it.  
*lanzetta v. New Jersey, supra*, 306 U. S. 451, 453.

### Conclusion

Wherefore, for the foregoing reasons, petitioner, Joseph Ago Stassi, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals may be reversed.

Respectfully submitted,

EDWARD R. SCHOWALTER,  
*Counsel for Petitioner.*

JACOB J. AMATO,  
*Of Counsel.*

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